NO. 56435-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY ALAN ROBERTS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 20-1-02023-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

The defendant, Jeffery Roberts, repeatedly stalked, harassed, and threatened A.B. over the course of a year. On at least four occasions, Roberts committed serious felonies to control A.B. and intimidate her into continuing their relationship. First, he forced his way into A.B.'s house by repeatedly assaulting her father. Next, he left numerous voicemails threatening to harm and kill her if she did not respond. Then, he imprisoned A.B. in her vehicle, threatening her until she agreed to speak with him about their relationship. Finally, he assaulted A.B. with his vehicle, kidnapped her, and took her to his residence where he attempted to rape her. Even after police involvement, Roberts continued to contact A.B., and violated a no contact order.

This appeal concerns matters of sentencing. Roberts wrongly alleges his convictions for second-degree assault, first-degree kidnapping, and attempted first-degree rape violate double jeopardy. The kidnapping does not merge with the

attempted rape because the crimes had independent purposes and effects. The assault does not merge with the kidnapping because it was unnecessary to prove assault to prove kidnapping. The convictions for all three crimes must stand.

The State cross-appeals, alleging the court improperly dismissed Roberts' conviction for unlawful imprisonment when sufficient evidence supported the jury's verdict. Roberts knowingly restrained A.B. in her vehicle, without her consent, while threatening and intimidating her. The court improperly substituted its own judgment in place of the jurors' when it analyzed the evidence. The case should be remanded for reinstatement of the conviction and resentencing.

II. RESTATEMENT OF APPELLANT'S ISSUES

A. Does the first-degree kidnapping conviction merge with the attempted first-degree rape conviction where the evidence shows the defendant had an independent purpose for the kidnapping and the crime had an effect on the victim separate from the rape?

B. Did the court properly conclude the second-degree assault and first-degree kidnapping convictions do not violate double jeopardy where assault was not necessary to prove kidnapping?

III. ASSIGNMENTS OF ERROR ON STATE'S CROSS-APPEAL

A. The trial court erred in sua sponte making and granting its own motion to vacate the unlawful imprisonment conviction.

B. The trial court erred in signing the order dismissing the unlawful imprisonment conviction.

C. The trial court erred in granting its own motion to vacate the unlawful imprisonment conviction without ever identifying the applicable legal test.

D. The trial court erred by not entering findings of fact and conclusions of law detailing the legal standards it applied and the application of those standards to the facts.

E. The trial court erred by entering a ruling dismissing the unlawful imprisonment conviction when the facts adduced at trial produced sufficient evidence of the crime.

IV. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR (CROSS-APPEAL)

A. Where the evidence introduced at trial was sufficient to sustain the jury's verdict of "guilty" for unlawful imprisonment, did the trial court err by sua sponte making and then granting its own CrR 7.4 motion for arrest of judgment?

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V. STATEMENT OF THE CASE

A. Roberts Stalked, Intimidated, and Harassed A.B. Over the Course of a Year

Jeffery Roberts and A.B. began dating after several years of friendship. 3RP 205. Soon afterwards, Roberts became very controlling. 3RP 206. He often called A.B. between 25 and 50 times per day, threatening to hurt her or damage her property if she didn't respond. RP 253-54. He routinely followed her, despite A.B.'s requests otherwise, showing up at her nail salon, appearing at the grocery store, and revving his motorcycle while driving past her home in the middle of the night. RP 246, 249, 251-52, 294, 315, 394.

A.B. lived with her father, James.[1] RP 367. Roberts frequently appeared uninvited at the house in the middle of the

[1] The State refers to James by his first name to protect A.B.'s privacy, as the two share the same last name. *See*, Gen. Orders of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012); *State v. Martinez*, __ Wn. App. __, 512 P.3d 1 at *2 (2022); *State v. Kalebaugh*, 179 Wn. App. 414, 416 fn. 1, 318

night, and banged on the siding to get A.B.'s attention. RP 251, 294, 369, 394. On many occasions, James went outside to "talk him down" and convince him to leave. RP 369. James often left the house in the morning to find Roberts hiding among the trees of the family's driveway. RP 294-95.

Some incidents between Roberts and A.B. involved physical violence. RP 218-19. On one occasion, A.B. sustained a knot to her head when Roberts threw her down; on another, Roberts strangled her, leaving red marks on her neck. RP 218-19, 269-71, 349, 353, 412.

A.B. first called the police in January 2020, out of concern for her personal safety when Roberts appeared at her home when her father was out of town. RP 246, 251-53, 269-70, 355, 443-44. Roberts continued to harass, stalk, and intimate A.B. throughout 2020. RP 248-49, 252, 269-71, 394-95. A no contact

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P.3d 288, 289 (2014), *affirmed*, 183 Wn. 2d 578, 355 P.3d 253 (2015).

order was issued on August 10, 2020. RP 508. Following a request from A.B., police conducted area checks in her neighborhood. RP 505-06, 509, 512. Police pulled over Roberts on December 15, 2020, after he was seen slowly driving past her home. *Id*. The back seats of Roberts' vehicle were folded down and police saw binoculars in the car. RP 519-20.

B. Roberts Burglarized A.B.'s Home to Gain Access to Her

On June 15, 2020, Roberts showed up uninvited at A.B.'s residence around 7am. RP 221-23, 368-70, 444. A.B., woken up by Roberts banging on the exterior wall near her bedroom, remained in bed while James went outside, intending to calm Roberts down and get him to leave. RP 221-23, 368-70, 380. Roberts was upset, pointing, yelling, making threats, and demanding to speak to A.B.. RP 370-71. When James told Roberts he needed to leave, Roberts lunged at him, shoving him repeatedly. RP 372-73. James is 5'7" and suffers from Parkinson's, while Roberts is 5'11" and 210 pounds. RP 371, 525. James attempted but failed to block Roberts' entry into the

home with his body. RP 371-72. Once inside, Roberts continued to shove James. RP 371, 374. He finally pushed him against a wall before moving past him towards A.B.'s bedroom. RP 371, 374.

Roberts entered A.B.'s bedroom and shoved the door closed behind him. RP 375. James attempted to get into his daughter's bedroom, but Roberts kept shutting the door, telling James to leave them alone. RP 223, 375, 408. Roberts yanked the sheets off of A.B.'s bed, saying something like, "oh, you're alone." RP 224. A.B. screamed for her father to call the police. RP 375, 416. James, scared and fearful of what Roberts might do, made the call to 911. RP 376. Roberts left before police arrived. RP 409.

James made clear to Roberts after this incident that he was unwelcome at the residence. RP 404. Afraid, and concerned there might be more problems, James learned and wrote down Roberts' address in case he needed to contact police again. RP 392-93.

C. Roberts Threatened to Harm and Kill Amber For Blocking His Communications

Between July 25 and August 8, 2020, Roberts left a series of voicemails on A.B.'s phone. Ex. 13, 32; RP 226, 556-57. In the first voicemail, Roberts threatens physical violence and tells A.B. he is watching her home:

> You better answer your mother fuckin' phone or I'll break your fuckin' window. You fuckin' stupid bitch, you turned the fuckin' light off. I fuckin' watched you, man. You fucking cunt. Oh my God A.B., you gonna beat, beat the fuck up dude. I cannot fuckin' stand you, you're such a fuckin' stupid cunt. Fuck. Such a dumbass fuckin' bitch.

Ex. 13, 32, audio file 46. In another, he tells her, "I'm gonna fucking hurt you so fucking bad A.B., I swear to God. Next time I see you I'm gonna act like I want to fuck you bitch, and I'm gonna break your fuckin' neck." Ex. 13, 32, audio file 47. In the third, he tells her:

> If you really want me to leave you alone, you won't fucking block me 'cause when you block me, I don't give a fuck if I hate you or not, I'm gonna fucking come down to your dad's house and 'cause fucking drama. So stop fucking blocking (unintelligible) ass bitch. I'll fuck you up, I swear to fucking God man.

Ex 13, 32, audio file 139. A.B. believed Roberts would hurt her or kill her if she did not do as he asked. RP 248.

D. Roberts Imprisoned A.B. in Her Vehicle to Force Her To Speak About Continuing Their Relationship

On August 6, 2020, A.B. ignored Roberts' many calls. RP 208. She was driving home around 10pm and about to pull into her driveway when she saw Roberts pass her in the opposite direction. RP 208-10, 382. Roberts turned his car around and chased her while A.B. drove towards her home as fast as she could. RP 208.

A.B. parked and Roberts pulled up close behind her. RP 210; Ex. 31. She opened her door and attempted to get out, but Roberts was too fast. RP 211, 386; Ex. 31. He ran up to her car, and blocked her exit with his body, preventing her from leaving. RP 211, 383; Ex 31. A.B. felt trapped and unable to escape. RP 211; Ex 31. Roberts began yelling at her, trying to get her to talk to him about furthering their relationship, despite A.B.'s protests that she didn't want to talk to him anymore. RP 217, 220.

A.B. screamed for her father while Roberts shouted at her. RP 211; Ex. 31. James heard Roberts' voice and came outside. RP 217, 382-83, 387. He saw Roberts opening A.B.'s car door and heard him threatening her. RP 383-84; Ex. 31. A.B., who is 4'10" and 102 pounds, was physically trapped inside her vehicle. RP 384-85, 525. She was unable to drive away with Roberts' truck behind her and the garage in front. RP 384-85, 388; Ex.31. Roberts' body was learning over A.B.'s in the car, and he was threatening her while thumping her on the chest. RP 388; Ex. 31. A.B. was screaming, "leave me alone." RP 217, 390.

James began yelling at Roberts, telling him to leave and not come back. RP 212, 346, 384. Roberts told him to mind his own fucking business and go back inside his house. RP 384. James did not leave, and Roberts eventually turned to yell at James. RP 403. A.B. did not leave the vehicle immediately. RP 218. She explained, "[t]hat's happened before where I've tried to get away, and if I'm in arm's reach of him, there is not - - there's something bad that's going to happen to me." RP 218. She

eventually got out of the vehicle, walked towards the garage, away from Roberts and her father, and then made her way to the house. RP 402-3. Roberts eventually left after speaking with A.B. and James, and after A.B. told him "what he wanted to hear" so he would leave. RP 220, 389.

E. Roberts Assaulted A.B. With His Vehicle, Kidnapped Her, and Attempted to Rape Her

The next day, A.B. went out with a friend. RP 255. Roberts was angry she had gone somewhere without telling him, and called and texted her repeatedly to ask her where she was and what she was doing. RP 255-56, 350-51. One of his voicemails referred to the previous night:

> Dude, you were fine with the driveway last night. Quit being a fucking cunt, a true face-assed bitch and fuckin' unblock me you fuckin' dumb fuck. Or I will fuck your fucking shit up dude, for real.

RP 235; Ex. 13, 32 (audio file 141).

When A.B. pulled into the road leading to her driveway around 1am on August 8, 2020, she saw Roberts waiting for her in his truck. RP 356-57. She called him and asked him to get out

of her driveway. RP 258. He told her he wasn't going to leave unless she came with him. RP 258. She attempted to approach her driveway from another direction, but Roberts refused to move. RP 259. Roberts got out of his car and shouted that he wasn't going to let her through, and she needed to turn around and head to his house. RP 259. She refused, saying she wanted to go home to her father. 268. Roberts, who was driving a big, lifted Ford truck with push bumpers[2] installed, revved his engine, and lurched it towards A.B.'s small two-door car. RP 259, 268-69, 355, 464, 466, 500-02.

A.B. believed Roberts would hit her vehicle. RP 269, 272-73. She started driving, then called her father to explain what was happening. RP 271. After hanging up, she called 911, telling them she was being forced to go somewhere she didn't want to go. RP 272-73. Roberts kept his truck within inches of her car

[2] Push bumpers permit law enforcement to execute PIT maneuvers, which involve police purposely hitting and disabling another vehicle. RP 464.

while they drove, so close that A.B. was shocked the cars didn't collide. RP 273-74. A.B. feared for her life. RP 272-73. James also called 911 and provided Roberts' address to police. RP 392-942.

The area where Roberts and A.B. lived was rural, dark, and isolated, especially at 1:30am. RP 273-74. His residence was not visible from the street. RP 277. To avoid angering him, A.B. hung up her phone as they turned into Roberts' driveway. RP 275. A.B. parked, and Roberts followed, parking his car right behind her to prevent her exit. RP 277, 459.

Roberts got out of his truck and told A.B. to go into his house. RP 279-80. When she refused, Roberts said he would "beat [her] ass," if she didn't comply. RP 354-355. They went into the house and into Roberts' room at his direction, where he closed and locked the door. RP 285-86, 384. A.B. told him this wasn't right, and she wanted to leave. RP 286. Roberts, suddenly calm, told her that what was happening was ok. RP 285.

Roberts began taking off A.B.'s pants, telling her, "one last time." RP 287-88. A.B. told him no and clearly expressed she did not want to have sex. R 288, 303. As this was occurring, Roberts and A.B. saw police arrive in the security-camera monitors installed in the bedroom. RP 289-90. Police heard an argument between an angry male voice and a scared female voice as they approached. RP 460, 471. A.B. remained in the room at Roberts' instruction when he left to get his mother to answer the door.[3] RP 460-62, 496-98. Police, who had seen Roberts inside the residence, took him into custody following a brief confrontation. *Id*. Only after his arrest did A.B. leave the room to speak with police. RP 461-63, 497-98.

F. The Jury Convicted Roberts of Nine Offenses

Roberts was convicted as charged at trial of the following offenses:

[3] Roberts' mother had previously declined to intervene when witnessing past physical violence between Roberts and Amber. RP 334.

Count	Charge	Victim	Offense Date
I	Unlawful Imprisonment	A.B.	August 6, 2020
II	Kidnapping in the First Degree	A.B.	August 8, 2020
III	Attempted Rape in the First Degree	A.B.	August 8, 2020
IV	Felony Harassment	A.B.	July 25, 2020 – August 8, 2020
V	Stalking (misdemeanor)	A.B.	January 5, 2020 - December 15, 2020
VI	Violation of a No Contact Order	A.B.	December 15, 2020
VII	Burglary in the First Degree	James	June 15, 2020
VIII	Assault in the Fourth Degree	James	June 15, 2020

IX	Assault in the Second Degree	A.B.	August 8, 2020

CP 33-41, 162-79; 7RP. The jury returned special verdicts finding the counts involving A.B. were domestic-violence offenses. *Id*.

G. The Court Sua Sponte Brought and Granted A Motion To Arrest The Jury's Unlawful Imprisonment Verdict

The court informed the parties that arguments about merger should be submitted one week prior to sentencing. RP 707. At a sentencing-continuance hearing, the court asked the parties to prepare answers to three questions:

> Question 1, Does sufficient evidence support Count 1? Does sufficient evidence support Count 7? Is there a merger between Counts 2 and 9?

(9/24/21)RP 3.[4] Roberts filed a sentencing memorandum asserting that (1) first-degree kidnapping and attempted first-degree rape were the same criminal conduct; and (2) the

[4] The verbatim record of proceedings from the trial is referred to as RP. The sentencing continuance hearing, and the sentencing transcript is referred to by (9/24/21)RP or (11/12/21)RP.

convictions for second-degree assault and first-degree kidnapping violated double jeopardy. CP 180-83. The State's memorandum argued: (1) first-degree kidnapping and attempted first-degree rape were not the same criminal conduct; (2) second-degree assault and first-degree kidnapping did not violate double jeopardy; and (3) sufficient evidence supported the convictions for unlawful imprisonment and first-degree burglary. CP 279-298 (8/16/22 Suppl. Designation).

The State at sentencing responded to the arguments in Roberts' sentencing memorandum. (11/12/21)RP 24. The court again questioned whether there was sufficient evidence for unlawful imprisonment, asking:

> THE COURT: … but what about unlawful imprisonment, Count 1?
>
> MS. ROBERTS: And this is not what defense briefed, but just Your Honor asked us to do additional briefing on, correct?
>
> THE COURT: I did.

(11/12/21)RP 24. The State defended the jury's finding of guilt for unlawful imprisonment. (11/12/21)RP 25-28. Roberts then

presented his sentencing arguments, never asserting insufficient evidence for unlawful imprisonment, or joining in the court's motion. (11/12/21)RP 28-36.

The court concluded that the first-degree kidnapping, attempted first-degree rape, and second-degree assault constituted the same criminal conduct, but the separate convictions for assault and kidnapping did not violate prohibitions against double jeopardy. (11/12/21)RP 38-39. As to the unlawful imprisonment conviction, the court concluded that, "as a matter of law, there's insufficient evidence to convict." (11/12/21)RP 38. The State objected. (11/12/21)RP 39. The court entered an order dismissing the unlawful imprisonment conviction. CP 205.

Roberts timely appealed. CP 238. The State timely cross-appealed. CP 241-72.

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VI. ARGUMENT

A. Roberts' Convictions For First-Degree Kidnapping, Attempted First-Degree Rape, and Second-Degree Assault Do Not Violate Double Jeopardy

The trial correctly determined that none of the convictions stemming from Roberts' first-degree kidnapping, attempted first-degree rape, and second-degree assault of A.B. violate double jeopardy. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Art. I, § 9 of the Washington Constitution protect a defendant against multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The legislature has the power, subject to constitutional limitations, to define crimes and assign punishments. *Id*. at 776. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.2d 753 (2005).

A double jeopardy violation is a manifest constitutional error that may be raised for the first time on appeal. *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). Whether separate convictions violate double jeopardy is reviewed de novo. *In re the Pers. Restraint of Knight*, 196 Wn.2d 330, 336, 473 P.3d 663 (2020). Vacation of the lesser conviction is required when double jeopardy has been violated. *Calle*, 125 Wn.2d at 776; *State v. Muhammad*, 194 Wn.2d 577, 617-18, 451 P.3d 1060 (2019) (concurrence – majority agreement).

Two offenses must be the same in both law and fact to qualify as the "same offense" for double jeopardy purposes. *In re Knight*, 196 Wn.2d at 336. No violations of double jeopardy occurred here where none of Roberts' convictions were the same in law and fact. The first-degree kidnapping does not merge with the attempted first-degree rape because each crime had an independent purpose and effect. Furthermore, since the State was not required to prove second-degree assault to prove first-degree

kidnapping, the offenses do not merge. This Court should affirm Roberts' convictions.

1. The separate purposes and effects of first-degree kidnapping and attempted first-degree rape preclude merger

Roberts' kidnapping does not merge with his attempted rape of A.B. because he had an independent purpose in kidnapping A.B., the crime had a separate effect upon her, and the crimes were not simultaneous. The four-step process used by courts to determine whether separate punishment is permitted for conduct that violates multiple statutes shows that the legislature intended Roberts' kidnapping and rape to be punished separately. *Freeman*, 153 Wn.2d at 771-73.

a. There is a presumption of merger where an attempted crime is elevated by another offense

The rape and kidnapping statutes do not permit separate punishment for the same conduct. The first step in the double jeopardy analysis is examination of the statutory language to determine whether the legislature expressly or implicitly

authorized multiple punishments. *Calle*, 125 Wn.2d at 776; *Muhammad*, 194 Wn.2d at 617. Neither the rape nor kidnapping statutes expressly permit multiple punishments for conduct that violates multiple statutes. RCW 9A.44.040 (first-degree rape); RCW 9A.40.020 (first-degree kidnapping); *See also*, *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979) (kidnapping and rape generally merge), *overruled on other grounds on other grounds by State v. Sweet*, 138 Wn.2d 466, 478-79, 980 P.2d 1223 (1999).

First-degree kidnapping and attempted first-degree rape can each occur without commission of the other. The second step, the "same evidence" test, involves examining whether each crime "requires proof of a fact which the other does not." *Freeman*, 153 Wn.2d at 772. Courts presume double jeopardy has not been violated when both offenses have different elements.[5] *Calle*, 125 Wn.2d at 777. This presumption exists

[5] This presumption can be overcome by clear evidence of contrary intent in legislative history. *Calle*, 125 Wn.2d at 780.

when one crime requires only intent to commit another. *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996). In this case, kidnapping required abduction with intent to commit rape. RCW 9A.40.020; CP 34, 123. The attempted rape required intent and completion of a substantial step. RCW 9A.28.020; RCW 9A.44.040; CP 130, 135. Each crime requires proof of a fact not required by the other.

The presumption changes to merger because the State charged Roberts with attempted first-degree rape predicated on kidnapping. CP 34. The third step, application of the merger doctrine, dictates that "when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *In re Knight*, 196 Wn.2d at 337 (citing *Freeman*, 153 Wn.2d at 772). The merger doctrine also applies when a crime is used to elevate an attempted crime to a higher degree. *In re Pers. Restraint of Francis*, 170 Wn.2d

517, 524, 242 P.3d 866 (2010); *see also State v. Deryke*, 110 Wn. App. 815, 824 (2002).

b. The independent purposes and effects of the kidnapping preclude merger with attempted rape

The independent purposes and effects of Roberts' kidnapping of A.B. preclude merger in this case. The fourth step of the double jeopardy examination is determining whether there is an "independent purpose or effect" for crimes that would otherwise merge. *In re Knight*, 196 Wn.2d at 337. The lesser conviction may stand when it "involved an injury to the victim that is separate and distinct from the greater crime." *Johnson*, 92 Wn.2d at 680; *see also*, *State v. Arndt*, 194 Wn.2d 784, 818, 453 P.3d 696 (2019); *State v. Harris*, 167 Wn. App. 340, 355, 272 P.3d 299, *review denied*, 175 Wn.2d 1006, 285 P.3d 885 (2012). The injury must be more than "merely incidental to the crime of which it forms an element." *Muhammad*, 194 Wn.2d at 622 (quoting *State v. Berg*, 181 Wn.2d 857, 866, 337 P.3d 310 (2014)). These circumstances exist here.

Factors historically considered when determining whether rape and kidnap merge support distinct convictions in Roberts' case. Whether the merger doctrine exception applies rests on the facts rather than the elements. *Freeman*, 153 Wn.2d at 779. Factors to examine include whether: (1) the crimes "occurred almost contemporaneously in time and place"; (2) the sole purpose of the kidnapping was to compel submission to the rape; and (3) the kidnap resulted in an "injury independent of or greater than the injury of rape." *Johnson*, 92 Wn.2d at 681. In examining the facts, courts should not "infer that the trier of fact relied on only the facts tending to prove both crimes." *See, e.g., In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 538, 167 P.3d 1106 (2007). Rather, the entire picture should be considered.

The facts viewed in their entirety show Roberts' kidnapping of A.B. had a separate and additional purpose from the rape. One of Roberts' purposes was certainly to effectuate the sex assault. RP 634-35; (11/12/21)RP 17-24. But the entire context of his relationship with A.B. shows it was not the sole

purpose. *Johnson*, 92 Wn.2d at 681. The kidnapping was also one more episode in Roberts' continuous and relentless efforts to control, harass, and intimidate A.B. into continuing their relationship. RP 246-49, 251-53, 269-71, 394-95, 443-44. His past behavior shows that having contact with her, monitoring her, and forcing her to abide by his wishes was an end in itself. RP 226, 248, 556-58; Ex. 13, 32. The kidnapping of A.B. that night furthered that end, no matter whether rape occurred later on. *In re Knight*, 196 Wn.2d at 337. The kidnapping had an independent purpose that was not "merely incidental" to the rape. *Muhammad*, 194 Wn.2d at 622; *Freeman*, 153 Wn.2d at 779.

Furthermore, the kidnapping produced a separate injury to A.B. She was not only put at risk for sexual assault, but feared, as she had in the past, that Roberts might harm or kill her if she did not cooperate with his demands. RP 248, 259, 268-69, 272-73, 354-55, 464, 466, 500-02. A.B.'s suffering was enhanced by her knowledge of Roberts' past violence, and the fact she was exposed to yet another incident of intimidation and harassment.

RP 218-19, 269-71, 285-86, 354-355. This injury to A.B. existed separately from the injury she experienced from the later singular act of attempted rape. *Johnson*, 92 Wn.2d at 681.

Finally, the crimes did not take place at the same time. A kidnapping continues for the duration of the unlawful detention. *State v. Classen*, 4 Wn. App. 520, 532-33, 422 P.3d 489 (2018). The kidnapping began at A.B.'s residence, continued through dark and isolated roads, continued when Roberts told her he would beat her if she didn't come inside, and continued when he locked her in his room. RP 271, 273-74, 277, 285, 354-55, 459. The attempted rape, on the other hand, only took place at Roberts' residence, inside his bedroom, during the moments he pulled down A.B.'s pants and told her "just one last time." RP 287-88. The crimes did not occur "nearly contemporaneously." *Johnson*, 92 Wn.2d at 681.

Courts decline to merge offenses where independent purposes and effects are evident. In *Saunders*, this Court found that a rape was not "merely incidental" to murder where the

perpetrators inflicted an egregious injury during the rape that was unnecessary to and independent from the subsequent murder. *State v. Saunders*, 120 Wn. App. 800, 822-24, 86 P.3d 232 (2004). The court also found the kidnapping had a separate effect from the murder where the perpetrators did not kidnap the victim to facilitate murder. *Id.* Similarly, in *Arndt*, the court addressed the separate purposes and effects of a murder and arson. *Arndt*, 194 Wn2.d at 814. While the arson caused the death of the victim, it also destroyed a home and was dangerous to other occupants. *Id*. Thus the two crimes did not merge despite factual overlap. *Id*. at 715. In this case, while the facts overlap, Roberts had a separate and additional purpose for the kidnapping, the effect upon A.B. differed, and the two crimes did not occur simultaneously.

c. Roberts erroneously relies on a case involving the same victims, intent, place, and time

Roberts erroneously relies on the factually-distinguishable *Johnson* in support of his argument the first-degree kidnapping

and attempted first-degree rape merge. Brief of Appellant at 22. In *Johnson*, the defendant picked up two hitchhikers who willingly went with him to his home. There, he bound and raped them. The Court found that "[t]he sole purpose of the kidnapping and assaulting was to compel the victims' submission to acts of sexual intercourse." *Johnson*, 92 Wn.2d at 681. Those crimes "resulted in no injury independent of or greater than the injury of rape." Here, in contrast, the kidnapping had multiple purposes, inflicted separate injury to the victim, and began in a separate location.

Roberts also argues the court specifically found he committed the kidnapping with intent to commit rape. Br. of Appellant at 23. But the court's comments arose in the context of determining whether the offenses were the same criminal conduct, and "a same criminal conduct analysis is distinct from a double jeopardy analysis." (11/24/21)RP 20-24; *State v. Wilkins*, 200 Wn. App. 794, 805-06, 403 P.3d 890 (2017). A finding that the rape and kidnap were the same criminal conduct

has no effect on Roberts' double jeopardy claim. This Court should affirm Roberts' separate convictions.

2. The trial court correctly determined the second-degree assault does not merge with first-degree kidnapping where the crimes are not the same in law or fact and had independent effects

The trial court correctly determined that Roberts' second-degree assault and first-degree kidnapping convictions do not violate double jeopardy. Use of the four-step double-jeopardy analysis demonstrates that the charges are not the same in law and fact, one was not necessary to prove the other, and each had separate effects. This Court should affirm Roberts' separate convictions for assault and kidnapping.

a. There is a presumption against merger where the two offenses differ in law and fact

Application of the first two steps in the double jeopardy analysis results in a presumption against merger because the assault and kidnapping each require proof of a fact not required by the other. The first step of the double jeopardy analysis confirms that neither statute expressly permits multiple

punishments. *Calle*, 125 Wn.2d at 776; RCW 9A.40.020(1); RCW 9A.36.021(1)(c).

The second step, the "same evidence" test, results in a presumption the two offenses do not violate double jeopardy. *Calle*, 125 Wn.2d at 777. First-degree kidnapping requires the intentional abduction of another person to facilitate the commission of a felony. RCW 9A.40.020(1)(b). Abduction means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(1). One permutation of second-degree assault involves assault with a deadly weapon. RCW 9A.36.021(1)(c); *State v. Baker*, 136 Wn. App. 878, 884, 151 P.3d 237 (2007). Assault occurs when: (1) there is an attempt to inflict bodily injury upon another; (2) there is an unlawful touching with criminal intent; or (3) the victim is put in apprehension of physical harm. *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012). The legal elements are not the same; kidnapping and assault each contain elements not shared

by the other. *State v. Taylor*, 90 Wn. App. 312, 318-19, 950 P.2d 526 (1998).

b. This Court should follow its precedent in *Taylor* and reaffirm that assault and kidnapping do not merge

This Court correctly found in *Taylor* that kidnapping and assault do not merge because the offenses are located in different chapters of the criminal code, neither statute contains language indicating the legislature intended one crime to be an element of the other, and the purposes of each crime differ. *Taylor*, 90 Wn. App. at 320. With respect to the last factor:

> … The second degree assault with a firearm statute criminalizes conduct that inflicts or attempts to inflict or places a person in fear of physical harm. The second degree kidnapping statute, on the other hand, criminalizes the abduction of victims against their will through the use of deadly force.

Taylor, 90 Wn. App. at 320. This analysis rests on the sound application of principles used to determine legislative intent. *Freeman*, 153 Wn.2d at 773; *see also*, *State v. Hughes*, 166 Wn.2d 675, 684, 212 P.3d 558 (2009). When the "same evidence" test results in a presumption that separate convictions

do not violate double jeopardy, the presumption can only "be overcome only by clear evidence of [contrary] legislative intent." *State v. Louis*, 155 Wn.2d 563, 570, 120 P.3d 963 (2006) (quoting *Calle*, 125 Wn.2d at 780). Roberts fails to show such clear legislative intent here. *See*, *Lous*, 155 Wn.2d at 570.

c. Merger of assault and kidnapping is not analogous to merger of assault and robbery

Unlike the crime of robbery, kidnapping never requires an assault, or actual use of a deadly weapon, to meet its elements. Following case law applicable to robbery and assault, Division I departed from *Taylor* and held that second-degree assault merges with second-degree kidnapping where the State is required to prove a deadly-weapon assault to prove kidnapping. *State v. Davis*, 177 Wn. App. 454, 462, 311 P.3d 1278 (2013). Under *Davis*, reviewing courts must examine how each offense is charged and proved. *Id*. at 464. An assault merges with kidnapping where it was necessary to elevate unlawful imprisonment to second-degree kidnapping. *Id*. at 464-65.

By definition, proving robbery requires the perpetrator to commit an assault:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190. First-degree robbery occurs when the perpetrator is armed with a deadly weapon, displays a deadly weapon, or inflicts bodily injury. RCW 9A.56.200; *State v. Kier*, 164 Wn.2d 798, 806, 194 P.3d 212 (2008). Assault therefore merges with robbery when it is a part of the crime. *Freeman*, 153 Wn.2d at 759; *Kier*, 164 Wn.2d at 805. Assault may only remain a separate offense when it is separate and distinct from the robbery. *Freeman*, 153 Wn.3d at 778-79.

Proving second-degree assault, however, is not necessary to meet the elements of kidnapping. *State v. Majors*, 82 Wn. App. 843, 846, 919 P.2d 1258 (1996). Abduction can occur by secreting or holding a person where he or she is unlikely to be found. RCW 9A.40.010(a). When it occurs by the use or

threatened use of force, neither assault nor the actual use or threatened use of a deadly weapon is required. RCW 9A.40.030(b). For example, a perpetrator could tell the victim they will be killed if they resist.

Furthermore, unlike the elevation of theft to robbery, assault by deadly weapon is not required to elevate unlawful imprisonment to second-degree kidnapping, or second-degree kidnapping to first-degree kidnapping. Thus, it does not implicate traditional application of the merger doctrine. *In re Knight*, 196 Wn.2d at 337 (citing *Freeman*, 153 Wn.2d at 772). In sum, the fact that deadly weapon second-degree assault is not necessary to prove kidnapping, and that assault does not elevate any kidnapping offense to a higher offense, evidences legislative intent to punish the crimes separately.

d. Merger does not occur even if this Court applies the test in *Davis*

Even if this Court applies *Davis* to Roberts' case, no merger occurs because the second-degree assault was not necessary to prove the kidnapping. The court in *Davis* found

merger because, "[a]s charged and proved … in the absence of the State proving that Davis committed the crime of second degree assault by means of a deadly weapon, Davis could have been convicted only of the lesser crime of unlawful imprisonment." *Davis*, 177 Wn. App. at 462. The same analysis is used to determine whether assault merges with robbery. *Freeman*, 153 Wn.2d at 759.

Here, proving second-degree assault was unnecessary to prove kidnapping. The assault was undoubtedly part of Roberts' efforts to force A.B. to cooperate with him that night. RP 640-41; (11/21/21)RP 17-24. But Roberts' threat of deadly force had already been communicated to A.B. prior to the assault. In the preceding week, Roberts repeatedly threatened to harm or kill A.B. if she did not cooperate with his demands for contact. Ex. 13, 32; RP 226, 556-57. A.B. believed these threats. RP 248. The jury found beyond a reasonable doubt that this behavior constituted felony harassment. CP 36, 162-79, 214. The assault

with the vehicle alone did not communicate deadly force, nor was it necessary to communicate deadly force.

Additionally, Roberts secreted A.B. in a place she was unlikely to be found. Roberts forced A.B. through a dark, rural, and isolated area. RP 273-74. He brought her to his home, which was not visible from the street. RP 277. He trapped her with his truck, before forcing her into the house with a threat of bodily injury, and brought her to a room where she could not escape. RP 277, 279-80, 285-86, 354-55, 384, 459. The only other adult present, Roberts' mother, had never before intervened on A.B.'s behalf. RP 334. Application of the *Davis* test does not result in merger because for two separate reasons, proving assault with a deadly weapon was unnecessary to prove kidnapping. *Davis*, 177 Wn. App. at 462.

e. Roberts erroneously relies on a case applying the rule of lenity to an ambiguous verdict involving alternative means

Roberts erroneously relies on *Deryke* to argue that because the jury was provided the full definition of abduction, including

use, or threatened use of deadly force, the rule of lenity applies and the offenses merge. Br. of Appellant at 16. In *Deryke*, merger of rape and kidnapping was required under the rule of lenity because neither the State nor jury specified whether the deadly weapon or kidnapping *alternative means* elevated attempted rape to a first-degree felony. *Deryke*, 110 Wn. App. at 823-24. But only one alternative means was submitted in Roberts' case. CP 126. Abduction and secreting are part of the definitional statute, not alternative means. *See*, *State v. Smith*, 159 Wn.2d 778, 793 fn. 1, 154 P.3d 873 (2007). The case is inapplicable here.

Courts should not "infer that the trier of fact relied on only the facts tending to prove both crimes." *See, e.g., In re Borrero*, 161 Wn.2d at 538. In *Esparza*, the court rejected an argument that offenses merged where an assault could have been the substantial step for attempted robbery. *State v. Esparza*, 135 Wn. App. 54, 63, 143 P.3d 612 (2006). The court found it was not clear or necessary that the assault be the substantial step, because there was other evidence that could have constituted the

substantial step. *Id*. The same analysis applies here. Jurors could have believed the assault did not constitute a true threat of deadly force and instead relied upon Roberts' secreting of A.B., or his prior threats to kill. Express specification by the jury of which part of the abduction definition it used is not required. Nor is merger required where multiple acts established a kidnapping.

f. The assault and kidnapping separately injured A.B

Application of the fourth step of the double-jeopardy analysis also precludes merger because the two crimes produced separate injuries. The second-degree assault put A.B. in imminent fear of physical harm. RP 269, 272-73, 354-55; (11/12/21) 21, 24. The kidnapping, in contrast, resulted in her involuntary movement to a place of Roberts' choosing. RP 271; (11/12/21) 21, 24. Like this Court observed in *Taylor*, fear of harm and abduction are separate evils, protected against in different parts of the criminal code. *Taylor*, 90 Wn. App. at 320. In this case, these separate evils had two independent effects on the victim. This Court should affirm the trial court's conclusion

that the second-degree assault and first-degree kidnapping convictions do not violate double jeopardy.

B. The Court Erred in Vacating and Dismissing the Jury's Unlawful Imprisonment Conviction

The trial court improperly vacated the unlawful imprisonment judgment on its own motion in violation of the applicable court rule and the ample evidence supporting the jury's conviction. This Court should reverse the trial court's erroneous ruling, reinstate the verdict, and remand for reimposition of the conviction and resentencing.

1. The court exceeded its authority when it dismissed the unlawful imprisonment conviction

The trial court exceeded its authority by bringing and granting its own motion to set aside the unlawful imprisonment verdict. Criminal Rule (CrR) 7.4(a) permits only the defendant to bring a motion for arrest of judgment. Roberts never brought such a motion. CP 180-83; (11/12/21)RP 28-36. The court raised the issue itself at the sentencing-continuance hearing, and then

again at sentencing. (9/24/21)RP 3; (11/12/21)RP 24. The court had no authority to raise and grant such a motion on its own.

The court's actions violated Roberts' right to make decisions about his case. The defendant's right to autonomy allows him the right to decide what plea to make, to make decisions regarding affirmative defenses, and decide whether to appeal a conviction or collaterally attack a final judgment. *See, e.g.*, *State v. Corstine*, 177 Wn.2d 370, 375-379, 300 P.3d 400 (2013) (a court may not instruct on an affirmative defense over the defendant's objection); *State v. Hall*, 162 Wn.2d 901, 911-12, 177 P.3d 680 (2008) (a prosecutor's CrR 7.8(b) motion to vacate a void conviction cannot be granted over the defendant's objection); *State v. Dodd*, 120 Wn.2d 1, 15, 838 P.2d 86 (1992) (defendant's right to autonomy precludes a court from rejecting his waiver of general review of his death sentence); *State v. Jones*, 99 Wn.2d 735, 743, 664 P.2d 1216 (1983) (trial court may not enter a plea of not guilty by reason of insanity over a defendant's objection). A competent defendant's right to control

his or her case may not be interfered with by judges, defense counsel, or prosecutors.

Even if operating from benevolent motives, a trial judge is not free to make any decision he or she wishes about a defendant's case. *State v. Curry*, 191 Wn.2d 475, 484, 423 P. 3d 179 (2018) (quoting *Coggle v. Snow*, 56 Wn. App. 499, 504-05, 784 P.2d 554 (1990) (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 141 (1921))). The court in this case violated the plain language of CrR 7.4 and Roberts' right to autonomous decision-making about his case when it made and granted a motion to arrest the unlawful imprisonment verdict.

2. The court did not identify the applicable legal standard or factual basis of its motion or ruling

The court further erred by failing to identity the factual basis or legal standard for its CrR 7.4 motion. CrR 7.4(b) requires a motion to arrest judgment to "identify the specific reasons in fact and law as to each ground on which the motion is based." CrR 7.4(b). Here, the court simply told the parties to address the issue of evidentiary sufficiency of the conviction.

(9/24/21)RP 3. Neither the applicable legal standards, nor the facts concerning to the court were identified. Following argument, the court simply stated, "I'm gonna find unlawful imprisonment, there's - - as a matter of law, there's insufficient evidence to convict. So, I'll dismiss Count 1." (11/12/21)RP 24. No oral or written findings explained the court's reasoning, or the applicable legal standards. Even if the court was permitted to bring its own motion to set aside the verdict, it erred by failing to identify the factual and legal basis for its motion and ruling.

3. Sufficient evidence supports the jury's guilty verdict for unlawful imprisonment

The trial court erred by dismissing the unlawful imprisonment conviction where sufficient evidence supported the jury's verdict. CrR 7.4(a)(3) permits the arrest of judgment upon "insufficiency of the proof of a material element of the crime." The trial court assesses evidentiary sufficiency by the same legal standards used to assess sufficiency of the evidence on appeal. *State v. Ceglowski*, 103 Wn. App. 346, 349, 12 P.3d 160 (2000). When reviewing a CrR 7.4 decision, the appellate

court engages in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000).

a. Evidence is sufficient when a rational juror could find the essential elements beyond a reasonable doubt

A rational juror could conclude Roberts committed unlawful imprisonment based on the evidence admitted at trial. Evidence is sufficient to support a conviction when any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). A sufficiency challenge admits the truth of the State's evidence. *Id.* at 265-66. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Scanlon*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). The court defers "to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence." *State v. Embry*, 171 Wn. App. 714, 742, 287 P.3d 648 (2012). Credibility determinations in

particular are not subject to review. *Cardenas-Flores*, 189 Wn.2d at 266.

b. A rational juror could find Roberts unlawfully restrained A.B.

In this case, the jury correctly determined that all of the essential elements of unlawful imprisonment were met. The crime of unlawful imprisonment requires the State to prove the defendant "knowingly restrain[ed] another person." RCW 9A.40.040. "The word 'restrain' has four components: '(1) restricting another's movements; (2) without that person's consent; (3) without legal authority; and (4) in a manner that substantially interferes with that person's liberty." *State v. Dillon*, 12 Wn. App. 2d 133, 141-42, 456 P.3d 1199 (2020), *review denied*, 195 Wn.2d 1022, 464 P.3d 198 (2020) (quoting *State v. Warfield*, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000)). The term "knowingly" applies to all elements of restraint. *Warfield*, 103 Wn. App. at 157.

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(1) Roberts knowingly restricted A.B.'s movements

Roberts knowingly restricted A.B.'s movements when he purposefully prevented her from leaving her car and going into the safety of her father's home. A person's movements are restricted when he or she "is deprived of either liberty of movement or freedom to remain in the place of his lawful choice." *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983) (quoting *Kilcup v. McManus*, 64 Wn.2d 771, 777, 394 P.2d 375 (1964)). Words alone can be enough to restrain another person when they communicate serious threats that restrict the movements of an intimidated victim. *State v. Landsdowne*, 111 Wn. App. 882, 889, 46 P.3d 836 (2002). Here, Roberts physically blocked A.B.'s exit from her vehicle. RP 211, 383; Ex. 31. He used verbal threats, as well asf physical intimidation when he leaned over much-smaller A.B. while thrusting his hand at her chest. RP 211, 383-84, 388, 525; Ex. 31. A.B.'s movements were restricted when she was deprived of the

liberty of movement from her car.[6] Roberts' actions show this was done purposefully, knowingly, and intentionally.

(2) Roberts knowingly restrained A.B. without her consent

A.B.'s actions show her lack of consent to Roberts' restraint. Restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(6). A defendant's use of intimidation and fear is evidence the victim did not consent. *Dillon*, 12 Wn. App. 2d at 137. Prior domestic violence incidents may also show lack of consent where a victim acquiesces due to prior violence. *State v. Ashley*, 186 Wn.2d 32, 42, 375 P.3d 673 (2016).

Here, after A.B. saw Roberts in his vehicle, she attempted to reach the protective environment of her home and father as quickly as possible. RP 208. Upon arrival, she tried to get out of

[6] The video of the unlawful imprisonment episode was before the jury. Ex. 31. Absent consideration of the video, it is impossible to fully consider the evidence the jury used to render its verdict. The video must be considered along with the other facts elicited at trial to determine whether sufficient evidence supports the conviction.

her car, but was prevented from doing so by Roberts. RP 211; Ex. 31. She screamed "leave me alone," in response to Roberts' efforts to contact her. RP 217, 390. A.B. did not try to force her way out of the vehicle because Roberts had been violent towards her in the past when she tried to get away from him. RP 218-19. When she was able, she got out of her vehicle and walked away from the location where Roberts and her father were interacting. RP 402-03. The evidence A.B. did everything she could to escape Roberts shows she did not consent to the restraint. The jury could conclude Roberts knew she did not consent based on her observable actions and her verbal reaction to him.

(3) Roberts knowingly restrained A.B. without lawful authority

Roberts had no good faith belief he could restrain A.B. Defendants act without lawful authority when their acts had no lawful purpose. *Dillon*, 12 Wn. App. 2d at 143. Lawful authority does not apply in the domestic violence content; rather, it is only relevant where the defendant has a good faith belief he had legal

authority to restrain someone else's movements. *State v. Johnson*, 180 Wn.2d 295, 303, 325 P.3d 135 (2014).

(4) The knowing restraint of A.B. was substantial

A "substantial interference" with the liberty of another "is a real or material interference … as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." *State v. Washington*, 135 Wn. App. 42, 50, 143 P.3d 606 (2006) (internal quotations omitted). Roberts materially interfered with A.B.'s liberty by trapping her in her vehicle for some time while he threatened and intimidated her. Ex. 31; RP 211, 383-85, 388, 525. A.B.'s terrified restraint constitutes more than mere annoyance, slight inconvenience, or an imaginary harm.

A "[m]eans of escape 'does not automatically preclude prosecution for unlawful imprisonment. But for the State to succeed on this theory, the known means of escape must present a danger or more than a mere inconvenience." *Dillon*, 12 Wn. App. 2d at 144 (quoting *State v. Kinchen*, 92 Wn. App. 442, 452 fn. 16, 963 P.2d 928 (1998)). Fear of the defendant can make a

means of escape more than a mere inconvenience. In *Dillon*, the court found that the victim "feared that disobeying [the defendant's] commands presented a serious risk of danger and that [the victim] felt intimidated by [the defendant's] orders and complied to avoid a physical confrontation." *Id*. at 145. Thus, there was sufficient evidence of unlawful imprisonment despite a potential means of escape. *Id*. As it did in this case, a victim's prior history with the defendant can also show that escape would present a danger, not a mere inconvenience. *Scanlon*, 193 Wn.2d at 772-73.

The restraint does not need to continue for an extended period of time or result from extreme measures. In *Allen*, a 16 year-old who consensually went to an apartment with adult men later became scared and wanted to leave. *State v. Allen* 116 Wn. App. 454, 458, 66 P.3d 653 (2003). The court found that her testimony she "screamed and tried to leave the room, but the defendants stood in the door and would not let her leave" was sufficient evidence of unlawful restraint. *Id*. at 466. Similarly, in

Officer, the court found evidence the defendant told his girlfriend she could not leave, after physically assaulting and threatening her, was sufficient evidence of restraint, despite a means of escape. *State v. Officer*, No. 77946-0-I, 2019 WL 3418295 at *9 (Wash Crt. App. July 29, 2019) (unpublished - cited under GR 14.1 for persuasive value only).

Though A.B. could have theoretically struggled with Roberts, or attempted to crawl over the passenger side seat to exit the vehicle, those actions would have been dangerous and more than a mere inconvenience. *Dillon*, 12 Wn. App. 2d at 144; *Scanlon*, 193 Wn.2d at 772-73. A.B. faced physical injury in the past when she tried to escape from Roberts. RP 217-18. Roberts' blocking of A.B.'s exit from her vehicle, leaning into her vehicle, verbally threatening her and using intimidating body language, and trapping her in her vehicle for some time constituted a substantial interference with A.B.'s liberty.

Sufficient evidence shows Roberts' substantial interference with A.B.'s liberty was knowing. In *Howard*, an

analogous case, the court found sufficient evidence the defendant acted knowingly when he physically prevented his girlfriend from leaving the house, she had told him she wanted to leave, and she believed the defendant acting intentionally in trying to prevent her from leaving. *State v. Howard*, 1 Wn. App. 2d 420, ¶ 41, 405 P.3d 1039 (2017) (citation to unpublished portion - cited under GR 14.1 for persuasive value only).

Here, Roberts saw A.B. drive away from him at a high rate of speed and attempt to get out of her vehicle. RP 208-10, 382. This occurred following days of active harassment by Roberts and A.B.'s non-response to his attempts at contact. RP 208, 226, 248, 556-57; Ex. 13, 32. When Roberts engaged A.B., it was clear to her he wasn't leaving until he got what he wanted, which was to talk to her about continuing their relationship. RP 217, 220. In other words, he was intentionally keeping A.B. in one place to force her to engage with him. This occurred despite A.B.'s active efforts to get away from him, and tell him to leave her alone. RP 217, 220, 390. A rational juror could conclude

from this evidence that Roberts knew he was substantially interfering with A.B.'s liberty.

c. Imprisonment in a vehicle can constitute unlawful imprisonment

Courts have found sufficient evidence of unlawful imprisonment when defendants imprison their significant others in their vehicles. In *Atkins*, sufficient evidence supported the conviction where the defendant told the victim she was not leaving, forced her back into the car, and threatened her when she tried to seek help. *State v. Atkins*, 130 Wn. App. 395, 402, 12 P.3d 126 (2005). In an unpublished case, the court summarized foreign decisions affirming unlawful imprisonment convictions for confining a victim inside a vehicle:

> In *Stephens v. State*, 10 N.E.3d 599, 602 (Ind. Ct. App. 2014), the defendant ignored the victim's repeated pleas to let her out of the car, refused to stop the car, and instead grabbed her phone and removed its battery. In *State v. Jason B.*, 111 Conn. App. 359, 361, 958 A.2d 1266 (2008), the victim repeatedly sought to exit the car, but each time the defendant grabbed her by the arm and pulled her back. In *State v. Youngs*, 97 Conn. App. 348, 351, 904 A.2d 1240 (2006), after professing his love for the victim, the defendant dragged her into his

> vehicle and then employed the automatic door locks to prevent the victim from exiting the car. Finally, in *State v. Ricchetti*, 74 Ohio App. 3d 728, 729, 600 N.E.2d 688 (1991), the defendant did not stop his vehicle when the victim requested that he do so and instead continued to flee from the police.

State v. Michal, No. 34744-3-III, 2018 WL 287502 at *5 (Wash Crt. App. Jan. 4, 2018) (unpublished - cited under GR 14.1 for persuasive value only).

Here, like in *Atkins*, and the cases from foreign jurisdictions, sufficient evidence supported the conclusion Roberts imprisoned A.B. in her vehicle.

d. The trial court improperly substituted its own judgment in place of the jurors' assessment

The trial court wrongly substituted its own assessment of the evidence in place of the jurors' assessment. A motion to set aside the jury's verdict must be denied if there is *any* competent evidence from which a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found that the essential elements of the charged crime had been proved beyond a reasonable doubt. *State v. Longshore*, 97 Wn. App. 144, 147,

982 P.2d 1191 (1999), *affirmed*, 141 Wn.2d 414, 5 P.3d 1256 (2000). In ruling on a motion for arrest of judgment, the trial court may not weigh the evidence itself but rather it may only examine whether the evidence is sufficient to sustain the verdict. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971); *State v. Hampton*, 100 Wn. App. 152, 157, 996 P.2d 1094 (2000), *rev'd on other grounds*, 143 Wn.2d 789, 24 P.3d 1035 (2001). Whether an element of a crime has been proven is "a matter best left to the unanimous, contemporaneous assessment of twelve jurors than to the retrospective guesswork of a single judge acting as a thirteenth juror." *State v. Williams*, 96 Wn.2d 215, 227, 634 P.2d 868 (1981).

An alternative assessment of the evidence does not undermine the sufficiency of the evidence where a rational juror could conclude the defendant is guilty. "[I]t is for the jury … to determine the credibility of witnesses and to resolve conflicts in the evidence," not the trial court following the verdict. *Allen*, 116 Wn. App. at 660-61. From the oral record, it appears the court

assessed the imprisonment as a byproduct of Roberts' attempts to speak with A.B. about their relationship. (11/24/21) RP 26-28. But as explained, *supra*, a rational juror could conclude the imprisonment was knowing and purposeful given the evidence A.B. had been avoiding contact with the defendant, tried to escape him, and told him to leave her alone. The trial court erred by bringing its own motion to arrest the verdict and dismissing the conviction when sufficient evidence supported the verdict. This Court should reverse the improper dismissal and remand for reinstatement of the conviction and resentencing. *State v. Cole*, No. 50433-2-II, 2019 WL 2314619 at *4 (Wash. Crt. App. May 30, 2019) (unpublished - cited under GR 14.1 for persuasive value only).

C. Roberts Fails to Provide Applicable Authority and Meaningful Analysis to Support His Claims in His Statement of Additional Grounds

In a statement of additional grounds, Roberts alleges his counsel performed ineffectively by (1) failing to show Roberts the discovery; (2) calling his mother as a witness at trial against

Roberts' instruction; (3) not learning of additional evidence at Roberts' disposal; and (4) not utilizing such favorable evidence at trial. Statement of Additional Grounds, filed June 22, 2022. He also alleges that records would show the victim was texting him during trial, the video entered as evidence was edited by James, and the testimony at trial was all hearsay. *Id*.

Roberts fails to cite authority or evidence for his claims. Arguments unsupported by applicable authority and meaningful analysis should not be considered. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).[7] A pro se litigant must comply with all applicable rules and statutes and is held to the same standard as an attorney. *In re*

[7] *See also*, *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *State v. Camarillo*, 54 Wn. App. 821, 829, 776 P.2d 176 (1989); *In re Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (declining to scour the record and construct arguments)). *See also*, RAP 10.3(a)(6) (petitioner's brief should contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); RAP 16.7(a)(2); RAP 16.10(d).

Pers. Restraint of Rhem, 188 Wn.2d 321, 328, 394 P.3d 367 (2017). This Court should not consider Roberts' undeveloped and unsupported claims.

VII. CONCLUSION

This Court should find that Roberts' convictions for first-degree kidnapping and attempted first-degree rape do not merge because the crimes had separate purposes and effects. Furthermore, Roberts' second-degree assault conviction does not merge into his first-degree kidnapping conviction because the crimes are not the same in law or fact. Finally, this Court should find the trial court erred in dismissing Roberts' unlawful imprisonment conviction, and remand for reinstatement of the conviction and resentencing.

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RESPECTFULLY SUBMITTED this 22nd day of August, 2022.

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8/22/2022	*s/ Therese Kahn*
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PIERCE COUNTY PROSECUTING ATTORNEY

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